UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIFTH REGION

Baltimore, Maryland

SHUTTLE EXPRESS, INC.,
D/B/A SUPERSHUTTLE BALTIMORE [1]

Employer

Case 5-RC-16601

and

AIRPORT SHUTTLE DRIVERS ASSOCIATION

Petitioner

DECISION AND ORDER

INTRODUCTION[2]

The Employer is a shared-ride airport shuttle service, providing, through its franchisees, door-to-door ground transportation to and from the Baltimore-Washington International Thurgood Marshall (BWI) Airport. On October 8, 2010, the Petitioner filed a petition to represent a unit of all full-time and regular part-time franchisee drivers employed at the Employer's franchise operations serving BWI Airport in Maryland; excluding all other employees, guards and supervisors as defined in the National Labor Relations Act ("Act").

The Employer claims the petition should be dismissed because the franchisee drivers are

[1] The name of the Employer appears as amended at hearing.

[2] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. A timely brief from the Employer has been received and considered. Upon the entire record in this proceeding, the undersigned finds that during the past 12 months, a representative period, the Employer purchased and received goods and services at its Hanover, Maryland location valued in excess of $50,000 from points located directly outside the State of Maryland. The undersigned further finds that the Employer is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

independent contractors, not employees within the meaning of Section 2(3) of the Act.[3] Additionally, the Employer contends that even if the franchisee drivers are not independent contractors, they are Section 2(11) supervisors, because they have the authority to hire, assign, reward, and/or discharge relief drivers, using their independent judgment.

Based upon my review of the record, I conclude that the dispositive issue is whether the franchisee drivers are Section 2(11) supervisors, because, irrespective of whether or not they are independent contractors, the petition cannot proceed if they are Section 2(11) supervisors. Based upon the record, and for the reasons below, I conclude, irrespective of whether or not the franchisee drivers are independent contractors, they possess the authority under Section 2(11) to hire, assign, reward and/or discharge relief drivers, using their independent judgment.[4] I,

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[3] The Employer disputes that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, because it was solely created for the purpose of representing the petitioned-for unit, which consists entirely of independent contractors, not statutory employees. As explained below, I will assume for the purpose of deciding this case that the franchisee drivers are statutory employees, and that the Petitioner qualifies as a Section 2(5) labor organization. See generally *Gino Morena Enterprises*, 181 NLRB 808 (1970). See also *Columbia Transit Corp.*, 237 NLRB 1196 (1978); *Arkay Packaging*, 221 NLRB 99 (1975); and *Lane Aviation Corp.*, 211 NLRB 824 (1974) (petitioning union not required to have constitution, bylaws, dues structure, or officers to qualify as a Section 2(5) labor organization).

[4] The hearing officer's rulings are free from prejudicial error and are affirmed. Prior to the close of the hearing, the Petitioner's attorney served the Employer with two subpoenas seeking documents; neither physical documents were entered into evidence. Based upon what was read into the record, the first subpoena sought: (1) all franchise files for all shuttle drivers, including relief drivers; and (2) all policies, memos, or correspondence with drivers concerning operating procedures for 2009 to the present or manuals. The second subpoena sought: (1) financial and computer records relating to income received related to the operation of each franchisee vehicle including outbounds, inbounds, and system fees, vehicle insurance and other fees; (2) records related to mileage with vehicles per year, hours worked, trip sheets, summaries for all vehicles; and (3) income statements for all vehicles. The Employer refused to provide the documents, but did not file a petition to revoke. The hearing officer gave the parties an opportunity to state their respective positions as to whether he could close the record without the production of the subpoenaed documents. Each party stated its position, after which the hearing officer ruled, concluding based upon the record that already existed that there was sufficient evidence from which the parties could argue their positions and the Regional Director could make a decision in this case. Thereafter, on November 4, 2010, the Petitioner filed a special appeal with the Regional Director regarding the hearing officer's ruling. In his special appeal, the Petitioner's attorney articulates why he believed he needed the information. His arguments all focused on how the subpoenaed information would assist him in arguing the issue of whether the franchisee drivers are independent contractors or employees. Post-hearing briefs were due on November 9. On November 10, the Petitioner's attorney

therefore, conclude that the representation petition, which only seeks to represent a unit of franchisee drivers, should be dismissed.[5]

FACTUAL SUMMARY

The Employer is in the business of selling franchises to individuals or corporate entities to provide shared-ride shuttle service to and from BWI Airport utilizing the Employer's reservation system and services. The Employer, itself, does not provide any shared-ride services. Such services are provided solely through the franchisee drivers and, if applicable, the relief drivers the franchise drivers individually elect to utilize to assist them.

The Employer has a lease and concession contract with the State of Maryland Aviation Administration for the non-exclusive right to operate scheduled shared-ride ground transportation service to and from Maryland, the District of Columbia, (Northern) Virginia, and BWI Airport. This lease and concession contract sets forth numerous detailed requirements regarding numerous topics, including customer service, fares, equipment, maintenance, reporting and record keeping, insurance, security, etc. The Employer, in turn, sells unit franchises to provide

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again wrote to the Regional Director, stating that because the hearing officer decided to close the record without the production of the subpoenaed documents, and his special appeal had not been ruled upon, it was "impossible for the Petitioner to submit an intelligent and reasoned brief with regard to important issues to which only one party had access to documents." In this November 10 submission, the Petitioner's attorney continued to focus his argument on how the information was critical to the issue of whether the franchisee drivers are independent contractors or statutory employees.

For the following reasons, I deny the Petitioner's special appeal and affirm the hearing officer's ruling regarding the subpoenaed materials. First, while the information the Petitioner seeks may be relevant to the issue of whether or not the franchisee drivers are independent contractors, I have decided this case based upon the fact that, irrespective of whether they are independent contractors, the franchisee drivers are Section 2(11) supervisors. Second, even assuming the subpoenaed documents would have information relevant to the supervisory issue the testimonial evidence in the record from all of the witnesses who testified on the issue, overwhelmingly established that each franchisee possesses the requisite authority under Section 2(11) to hire, assign, reward and/or discharge relief drivers, using their independent judgment, and there is no indication that any of the documents subpoenaed would contradict or refute the franchisee drivers' own understandings as to what they are able to do. I, therefore, conclude the record is sufficiently complete without the additional subpoenaed documents to decide the case.

[5] The Employer filed a timely post-hearing brief. As stated above, the Petitioner elected not to file a brief, and never requested an extension of time to file a brief.

shared-ride shuttle services, using the Employer's reservation system, under this lease and concession contract. The unit franchise agreement contains the requirements set forth in the lease and concession contract, as well as the additional obligations the Employer imposes as the franchisor. The provision of ground transportation services is heavily regulated, and the Employer and the franchisees are subject to several state and federal laws. In particular, the Employer and the franchisees are subject to the Maryland Public Service Commission's rules and regulations covering the operation of motor vehicles in the transportation of passengers for hire, which sets forth specific licensure, training, and certification requirements. These rules and regulations also set forth detailed requirements regarding the securing of permits to provide service, the maintenance, condition and operation of the vehicles used to provide service, insurance coverage and limit requirements for operating a vehicle for hire, etc. The unit franchise agreement contains a detailed procedure in which the franchisees can be found to be in default, and possibly lose their franchise, if they fail to comply with or abide by the terms of the franchise agreement or other applicable rules and regulations.

The franchisee can purchase a one-year or a ten-year franchise from the Employer. There are currently 84 franchisees: 75 have ten-year franchises and 9 have one-year franchises. The Employer requires that each franchisee pay a franchise fee based upon the type of franchise they own. The franchise fee for a ten-year franchise is between $15,000 and $35,000, which can be paid out over installments with interest. The franchise fee for a one-year franchise is around $2,500. The franchisee can purchase a fourteen-hour AM franchise, a fourteen-hour PM franchise, or a 24-hour franchise. The Employer requires each franchisee to pay a weekly system fee. The weekly system fee for AM and PM franchises is around $375, and the weekly system fee for 24-hour franchises is around $500. There also are additional deposits and fees for the

Nextel phone equipment, decals, etc. that the franchisees are to use or have on their vans. Each franchisee is responsible for acquiring, insuring, and maintaining a van that complies with the unit franchise agreement. The franchisees can purchase or lease a van on their own, or the Employer will assist them in leasing a van. The franchisee also can arrange with the Employer to have the lease payments deducted from their revenues on a weekly basis. The Employer also will assist franchisees in obtaining insurance for their vans, and the franchisees can arrange to have the Employer deduct and remit the premiums from their revenues to the insurance company.

Through the use of the Employer's Nextel phone system, franchisees are alerted to inbound reservations of people wanting to be shuttled to the BWI airport, and they can bid on or pass on those reservations if they are within a certain mile radius of the customers. Also, the franchisees can bid on or pass on outbound reservations, and typically will do so while waiting in a holding lot at the BWI airport. With very limited exceptions, a franchisee is free to choose whether or not to bid on or pass on any reservation sent to them on their Nextel phone.

Each week the franchisees will cash out for the jobs they performed and the money they received for the prior week. The Employer will deduct any monies the franchisee owes to the Employer for franchise fees and interest, insurance, vehicle lease payments and interest, system fees, and/or any other miscellaneous costs or fees. The Employer also will deduct its portion of the revenues each franchisee is required to remit to the Employer under the terms of their unit franchise agreement (10 percent), as well as deduct a portion of revenues for all outbound reservations (17.5 percent) each franchisee is required to remit to the Maryland Airport Administration under the lease and concession agreement and the unit franchise agreement. After these deductions are made, the Employer will issue the franchisee a reimbursement or reconciliation check. The Employer does not deduct any federal or state withholding or other

employment-related taxes from the check, and it does not pay unemployment insurance or workers compensation insurance for these franchisees. As previously stated, the franchisees are solely responsible for all costs associated with operating a franchise (e.g., purchase or lease payments, insurances, gasoline, vehicle maintenance and repairs, tolls, etc.).

Under the unit franchise agreement, each franchisee is permitted to utilize one or more substitute operators, more commonly referred to as "relief drivers." The unit franchise agreement requires that the franchisees notify the Employer of any relief driver(s) being used, as well as evidence that each relief driver meets all the necessary training, certification, and licensure requirements to operate the franchisee's van. Other than verifying that the relief drivers meet these requirements, the Employer has no other involvement in who the franchisee utilizes as a relief driver. Any issues or problems the Employer has with a relief driver, such as failing to abide by the terms or conditions of the unit franchise agreement or applicable regulations, are directed to the franchisee, and the franchisee is responsible for addressing those issues with the relief driver. Similarly, if the Employer or the State of Maryland has an issue with a franchisee's van or how the van is being used, the Employer will speak with the franchisee, not the relief driver, and the franchisee is responsible for addressing those issues.

ANALYSIS

As previously stated, the dispositive issue is whether the franchisee drivers are statutory supervisors.[6] Section 2(11) defines a "supervisor" as:

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[6] For the purposes of deciding this case, I will assume, without deciding, that the franchisee drivers are Section 2(3) employees. The question, however, that remains is whether the relief drivers are Section 2(3) employees, because Section 2(11) requires that the purported supervisor has the authority to (or effectively recommend the) hire, transfer, suspend, lay off, recall, promote, discharge, assign, responsibly direct, adjust grievances, reward, or discipline *other employees*. In determining whether an individual is an employee or an independent contractor, the Board applies the common-law agency test and considers all the incidents of the individual's relationship to the employing entity with no one factor being controlling. See *BKN, Inc.*, 333 NLRB 143, 144 (2001); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998); and *Roadway Package System, Inc.*, 326 NLRB 842 (1998). The Board has held the party asserting independent contractor status has the burden of proof. *BKN, Inc.*, 333 NLRB at 144.

Neither party has claimed that the relief drivers are independent contractors. The Petitioner was asked its position as to, if the franchisee drivers were found not to be independent contractors or statutory supervisors, whether the relief drivers should be included in the unit. The Petitioner argued the petitioned-for unit was an appropriate unit, and the relief drivers need not be included in the unit. When asked to address the status of the relief drivers, the Petitioner's attorney stated as follows at the hearing:

> The relief drivers in this case are people who simply take the place of a driver when that driver cannot fulfill his duties. So, if a driver is sick or whatever, they are employed only on an as-needed and temporary casual basis. They may be---they are not permanent by any nature. There is no contractual privity between the employer and that driver. Any relations with regard to that driver and whatever conditions that may exist or whatever compensation are solely a matter between that person, the driver, and the relief driver. So, as such, there is no basis other than – there's no relationship other than that between the driver and the relief.

Based upon the record, I conclude that the relief drivers are Section 2(3) employees. While the franchisees can operate without relief drivers, the witnesses who testified relied heavily on their relief drivers in order to effectively operate their franchises. Similarly, the relief drivers are dependent on the franchisee because they cannot operate a Super Shuttle van without being covered under a unit franchisee agreement. Furthermore, each relief driver's schedule, wage, and other terms and conditions of employment are determined primarily by the needs of the franchisee for whom he/she is working. The relief drivers are subject to and must abide by the same policies and regulations applicable to the franchisee drivers, as well as any additional rules or policies the franchisee adopts. The franchisee supplies the franchise, the van, the Nextel phone, and the reservation system. Without those items, the relief driver would not be able to provide shared-ride services under the lease and concession agreement. And, in contrast to the Petitioner's contention that these relief drivers are temporary or casual employees, the record reflects that most of the relief drivers work as such on a regular basis (from a couple of hours a week to 50-80 hours a week), and that most of the relief drivers have done so for months or years. While some of the relationships may be for limited periods of time, most appear to be open-ended. Of course, there are certain factors favoring finding that the relief drivers are independent contractors, such as that a few of the relief drivers work for multiple franchisees, several franchisees do not appear to deduct or pay state or federal withholdings, workers compensation insurance, unemployment insurance for the relief drivers, etc. Overall, however, I conclude the evidence establishes they are Section 2(3) employees.

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The enumerated powers in Section 2(11) are to be read in the disjunctive. However, possession of one or more of the stated powers does not convert an employee into a Section 2(11) supervisor unless the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[7] *Adco Electric Inc.*, 307 NLRB 1113, 1120 (1992). Section 2(11) only requires possession of authority to carry out an enumerated supervisory function, not its actual exercise, as long as the evidence shows that such authority actually exists and that its exercise requires the use of independent judgment. *Avante at Wilson*, 348 NLRB 1056, 1057 (2006). The burden of proving supervisory status rests on the party asserting that

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[7] In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board adopted a definition of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise....professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare, Inc.*, *Id.* at 693. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "not of a merely routine or clerical nature." *Id.* at 694. Consistent with the view of the Supreme Court, the Board held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* (citation omitted). However, "...the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.* The Board held as follows on the meaning of "independent judgment":

> To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term. "Independent" means "not subject to control by others." *Webster's Third New International Dictionary* 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Webster's Third New International Dictionary* 1223 (1981). Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

Oakwood Healthcare, Inc., *Id.* at 695.

such status exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001) and *Oakwood Healthcare, Inc.*, supra. Based upon my review of the record, I find that the Employer has met its burden of proof of establishing the franchisee drivers are Section 2(11) supervisors because they have the authority to hire, assign, reward, and discharge employees, using their independent judgment.[8]

Authority to Hire

As previously stated, under the terms of the unit franchise agreement, all franchisees are free to utilize relief drivers to operate the franchisee's van, and those relief drivers are subject to the same requirements as the franchisees. At least 61 of the 84 franchisees currently utilize one or more relief drivers in the operation of their franchise(s). There were 11 franchisees who testified at the hearing, and each utilizes one or more relief drivers. Each witness confirmed that they, as franchisees, are free to hire whomever they want, as long as the individual meets the licensure, certification and training requirements contained in the lease and concession

[8] In deciding whether the franchisee drivers are Section 2(11) supervisors, the franchisee drivers, regardless of whether they are independent contractors or employees, must have the ability to exercise their statutory authority "in the interest of the employer" regardless of who the "employer" actually is. The Board decided this issue in *Deaton Truck Lines, Inc.*, 143 NLRB 1372 (1963), aff'd *Deaton Truck Line, Inc. v. NLRB*, 337 F.2d 697 (5th Cir. 1964), cert denied 381 U.S. 903 (1965). In *Deaton*, the Board found that all of the drivers at issue, including multiple-owner-drivers (i.e., drivers who owned more than one truck leased to employer Deaton), were employees of the employer and not independent contractors, but further concluded that the multiple-owner drivers were supervisors because they possessed authority to hire and fire the drivers used to operate their leased trucks. On appeal to the Fifth Circuit Court of Appeals, the union argued that this supervisory authority was exercised in the interest of the multiple-owner-drivers and not in the interest of employer Deaton. The Court of Appeals noted that multiple-owner-drivers were free to accept or reject any driver who was in Deaton's driver pool, and thus they exercised their supervisory authority over the drivers in their own interest. However, the Court of Appeals further found that the multiple-owner-drivers' interest was "so intertwined with the interest of Deaton in the successful and efficient operation of the trucks...[as to be] in the interest of both Deaton and of the multiple-owner." See *Deaton Truck Line, Inc. v. NLRB*, 337 F.2d at 699.

Similar to *Deaton*, here the franchisee drivers have the authority to hire and fire the relief drivers used to operate their vans, and that authority is exercised in their interest (as employers themselves) or in the interest that is so intertwined with the interest of the Employer in the successful and efficient operation of the van(s). As a result, I conclude that the franchisee drivers have the ability to exercise their Section 2(11) supervisory authority in the interest of an employer.

agreement, the unit franchise agreement, and the applicable state and federal regulations. The only requirement that the Employer imposes is that the franchisee provide it with certain basic information, such as the relief driver's name, address, phone number, and documentation showing that he/she meets the above requirements.

Each of the franchisees who testified about relief drivers confirmed that he/she made the hiring decision independently, without the Employer's involvement. Several franchisees testified about why they decided to hire one or more relief drivers. Several testified they made the decision to hire because they wanted to maximize their revenues without personally having to work all of the hours necessary to do so, particularly if they owned a 24-hour franchise and were able to generate revenue 24 hours a day, 7 days a week, 365 days a year. A couple of the witnesses testified that they wanted to acquire additional franchises, and they needed relief drivers to drive the additional vans. One franchisee testified he hired a relative to provide them with a job and a way to make money. Each franchisee who testified on the topic, including those called by the Petitioner, stated that they did not need the consent or approval of the Employer in deciding whom to select.[9]

Also, several franchisees testified about how they selected people to be their relief drivers. About four or five years ago, the Employer provided franchisees with names of people who had expressed interest in being a relief driver, and the franchisees were free to use those individuals if they wished. Some of the names the Employer provided were individuals who were interested in becoming franchisees, but for one reason or another could not become

[9] There was one witness who suggested that the Employer's manager, Paul Elliott, had the authority to veto someone whom a franchisee wanted to hire. However, the witness did not provide any specifics to support the assertion, and it appeared to be the witness's speculation of what she believed could happen without anything more. I do not find this witness's speculation to be sufficient to refute the specific testimony offered by all of the other witnesses who testified about their selection of relief drivers.

franchisees at the time. Some of those people wanted the opportunity to work as relief drivers, and some of the witnesses testified that they started out as relief drivers before purchasing their franchise(s). There is no dispute that the franchisees were never obligated to use any of the people the Employer identified as being interested. More recently, the Employer has stopped providing franchisees with names of people interested in being a relief driver. Now, most of the franchisees rely upon advertising or word-of-mouth in finding people to be relief drivers. Certain of the individuals that franchisees selected to be relief drivers worked for other franchisees, while others were new to the profession. A couple of the witnesses explained, in detail, how they interviewed and selected their relief drivers, and their processes differed from one another.

Authority to Assign and Reward (Pay)

Once hired, the record reflects that each franchisee independently determines what schedule their relief driver(s) will work, how much their relief driver(s) will be paid, and what portion, if any, of the costs and fees their relief driver(s) will be responsible for paying. Sometimes this will be the result of negotiations between the franchisee and the relief driver, and other times it will be decided entirely by the franchisee. Either way, the Employer is not involved in the process, and the franchisees are not required to get the Employer's approval.

Several of the franchisees testified about their particular arrangements with their relief drivers, and their arrangements varied. Some franchisees split the hours, costs, and revenues equally with their relief drivers. Others split it up differently. A couple of the franchisees testified they had their relief driver(s) operate their van(s) exclusively, and the relief driver(s) paid all the costs and fees and kept most of the revenues. Regardless of the arrangement, the Employer issues one check, and that is to the franchisee. It is the franchisee's sole responsibility to pay (or not pay) his or her relief driver(s). It is also the franchisee's sole responsibility to

make sure that he/she/it is in compliance with all applicable state and federal laws, and is responsible for making sure that the relief drivers used are current on all licensure, certification and training requirements.

There are examples in the record of the individual arrangements that franchisees make with their relief drivers. One of the franchisees testified that he agreed to pay for his relief driver to take the necessary training courses in order to get certified and be able to operate the franchisee's van, while others hired their relief drivers after the relief drivers met the necessary licensure, certification and training requirements on their own. One of the franchisees testified that he made arrangements with his relief driver so that his relief driver could take a family vacation, and made arrangements to pay him in advance. These were all done without the need to obtain the Employer's consent or approval.

Authority to Discharge

If a franchisee has an issue with a relief driver, the record reflects that franchisee can independently decide to discharge a relief driver without the involvement or approval of the Employer. There are several examples in the record of a franchisee independently making the decision to discharge an employee. For example, one of the franchisees decided to discharge her relief driver because she received a complaint about how her relief driver interacted with a passenger, which she personally found to be serious enough to warrant discharge. The franchisee discharged the relief driver immediately without consulting with the Employer. Another franchisee decided to discharge his relief driver because the relief driver was supposed to work 12 hours a day, and he, according to the franchisee, only worked around 3 hours a day, and apparently slept the rest of the time. The franchisee gave the relief driver opportunities to improve, but the relief driver did not improve to the franchisee's satisfaction. As a result, the

franchisee decided, on his own, to discharge the relief driver. This same franchisee discharged another relief driver, who happened to be his nephew, after the nephew got into two accidents while operating the franchisee's van. The franchisee said that it is his personal rule that if one of his relief drivers gets into two accidents, he/she will be discharged. Each of these franchisees testified they did not need to consult with the Employer prior to terminating the relief drivers.

One of the Petitioner's witnesses, a franchisee, testified that he was, in effect, told by an agent of the Employer to discharge his relief driver. The franchisee testified that the Employer's Director of Operations, Jackie Holloway, told him that his relief driver was observed to be speeding excessively on multiple occasions, and that it would be in the franchisee's interest to let the relief driver go. The franchisee, however, characterized Ms. Holloway's statement about the relief driver as a suggestion, not a directive. Ms. Holloway notified the franchisee that he could be found to be in default under his unit franchise agreement, and risk losing his franchise, if he knowingly continued to utilize a relief driver who sped excessively on multiple occasions. The franchisee ultimately discharged the relief driver because he did not want to risk losing his franchise.

Another of the Petitioner's witnesses, a franchisee, testified that she had the authority to discharge her relief driver if, for example, the relief driver was not showing up for work or was sleeping in the van.

None of the franchisees who testified, including those called by the Petitioner, disputed that they could discharge a relief driver on their own, or claimed that they would need to get the Employer's approval before doing so.

CONCLUSION

Based on the foregoing, I conclude the Employer has met its burden and established that, irrespective of whether the franchisee drivers are independent contractors or statutory employees, they all possess the authority under Section 2(11) to hire, assign, reward and discharge relief drivers, using their independent judgment. As a result, because the petitioned-for unit consists solely of franchisee drivers, I am dismissing the petition.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by December 3, 2010. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[10] but may not be filed by facsimile.

Signed at Milwaukee, Wisconsin on November 19, 2010.

Irving E. Gottschalk, Acting Regional Director
National Labor Relations Board
Fifth Region
The Appraisers Store Building
103 South Gay Street, 8th Floor
Baltimore, Maryland 21202

[10] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.